UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

BRYLANE, L. P.
Petitioner

and Case 25-RM-597

MIDWEST JOINT BOARD,
UNION OF NEEDLETRADES,
INDUSTRIAL AND TEXTILE
EMPLOYEES, (UNITE), AFL-CIO, CLC[1]
Labor Organization

DECISION AND ORDER

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on August 22, 2002, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine whether a question concerning representation exists, and if so, to determine an appropriate unit for collective bargaining.[2]

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[1] The name of the labor organization appears as amended at hearing.

[2] Upon the entire record in this proceeding, the undersigned finds:
a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1)(B), and Section 2(6) and (7) of the Act.

I. THE ISSUES

The Petitioner Brylane, L.P. seeks an election within a multi-facility unit comprised of distribution workers employed at its two Plainfield, Indiana distribution centers and its Indianapolis, Indiana distribution center. It is the position of the labor organization involved herein, Midwest Joint Board, Union of Needletrades, Industrial and Textile Employees (UNITE), AFL-CIO, CLC, that the petition should be dismissed on grounds that no question concerning representation exists. However, in the event it is determined that a question of representation exists, the Union agrees that the multi-facility unit for which the Employer has petitioned, is an appropriate one for purposes of collective bargaining, and it is willing to proceed to an election within that unit.

II. DECISION

For the reasons discussed below, it is concluded that at no time since the inception of its organizational campaign among the Indiana employees of Brylane has UNITE made a request, demand or "claim" for recognition within the meaning of Section 9(c)(1)(B) of the Act, 29 U.S.C. Section 159(c)(1)(B). Since no question concerning representation exists, the present petition shall be dismissed.

III. STATEMENT OF FACTS

Brylane markets and distributes retail apparel and home furnishings through nine catalogs and a website. Brylane is headquartered in New York City and operates facilities in Massachusetts, Texas and three facilities in Indiana, which are the subject of the instant dispute. Brylane is a subsidiary of the French company, Pinault-Printemps-Redoute (herein referred to as PPR). The Indiana facilities receive apparel and household furnishings from vendors; warehouse the items as inventory, then process and fill customer orders received from the retail public. Approximately 740 distribution employees are currently employed within the petitioned unit.

UNITE began its organizational campaign among employees at Brylane's Plainfield and Indiana distribution centers in October of 2001. UNITE's campaign has been multi-faceted. UNITE solicited employees to sign cards authorizing the Union to represent them; distributed handbills to employees extolling the virtues of unionization; and held meetings for employees. On June 25, 2002, UNITE sponsored a rally in Indianapolis at which AFL-CIO Secretary-Treasurer Richard Trumpka addressed an assembled group of Brylane employees. There was also reportedly a rally in front of the building occupied by Brylane's law firm in Indianapolis, and a rally in front of Brylane's corporate office in New York City. On an unknown date(s) Union members and allies distributed leaflets at Gucci stores which discussed the Brylane campaign and PPR's alleged opposition to employees' rights to organize.[3] Handbills were also distributed to consumers in front of a Sears store in Indianapolis, seeking public support for the

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[3] Gucci is also a subsidiary of PPR.

employees' campaign. The Union also mobilized sympathetic members of the local community who authored a letter to Brylane which expressed concern regarding the strategy Brylane had adopted in response to the campaign. In July 2002, UNITE also registered a complaint with the U.S. Department of State asserting that Brylane and its parent company had engaged in serious violations of the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises. Several unfair labor practice charges were also filed by the Union and/or employees with Region 25 of the Board, alleging that Brylane had violated the Act, but all charges were dismissed or withdrawn.

During two telephone calls in mid-October to Brylane's Chairman and Chief Executive Officer, Russell Stravitz, the Union's New England Director /International Vice President Warren Pepicelli, informed Stravitz of the advent of the Union's campaign among its Indiana workers; asked that the Company become party to a neutrality[4] agreement; asked that it agree upon a card-check procedure; and explained the process. Stravitz declined both requests. The Union proceeded with its organizational campaign, and as early as November, 2001[5] it made statements to Brylane employees, the press and members of the public, that a majority of employees had executed authorization cards

At the Union's request, a meeting occurred on August 1, 2002, in New York City among representatives of the parties. In correspondence between the parties which preceded the meeting, the Union indicated the purpose of the meeting was to discuss "Brylane's and the union's conduct during the course of the campaign and dispute resolution options concerning union representation." Present on behalf of Brylane were CEO Stravitz, Alain Luchez, the Senior Vice President of the catalog division of PPR (called "Redcats,"), and Brylane's Senior Vice President of Human Resources, Audry Wathen. Present on behalf of UNITE were its President Bruce Raynor, its New England Director/Vice President (Warren Pepicelli), and another Vice President, Mark Fleischman. The parties' two principals, Raynor and Stravitz, were the primary spokesmen. With few exceptions, the parties' descriptions of the content of this meeting are consistent. Following introductions by the participants, Stravitz asked Raynor to state the reason he requested the meeting. Raynor gave a fairly lengthy description of the history of its organizing efforts at Brylane's Indiana centers and expressed criticism of the Company's campaign strategy. He stated that the Company had conducted a campaign of intimidation and threats directed toward employees, as well as attacks upon Union leadership. Raynor further

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[4] A neutrality agreement is one whereby an employer agrees that during a union's organizational campaign, it will remain neutral and not express opposition to its employees' selection of union representation. According to the Vice President, the card check procedure he envisioned would involve a neutral third party who would verify the authenticity of cards presented by the Union, and if a majority of an Employer's employees executed cards, the Employer would recognize the Union as the exclusive representative of its employees.

[5] The earliest evidence of record of such a claim of majority status occurred in a leaflet distributed to employees on approximately November 1, 2002. In addition to announcing the date of a meeting for employees, the leaflet states "Over the last few weeks, an [sic] majority of Brylane workers have signed union cards!"

stated that in light of the coercive atmosphere Brylane had created, the Union had concluded that a free and fair election could not occur at this time. Consequently, the Union believed that a neutrality agreement with a card-check procedure was the only way a representation question could accurately reflect true employee sentiments. At one point during the meeting CEO Stravitz asked Raynor what unit the Union "was interested in," and Raynor replied that the Union sought a unit comprised of employees of the three Indiana facilities. Following the Union's presentation, Stravitz presented his reply. He stated that there were employees at its Indiana centers who did not want Union representation as well as those who did, and he preferred to resolve the matter through Board election procedures. Pepicelli commented that Brylane enjoyed an amicable relationship with the Union in its representation of Brylane employees at its Massachusetts distribution center, and he did not understand why Brylane would not agree to the card check procedure for Indiana workers. The meeting apparently ended on a amicable note, but without achieving a consensus between the parties.

The parties' version of the content of this meeting differs in one respect: The Employer asserts that Raynor stated that a majority of employees had signed union authorization cards, while the Union denies any such thing was said. Brylane's Vice President of Human Resources testified as follows:

> Mr. Raynor said that he has the cards. He has prepared[sic] the majority of the cards and he is prepared to prove it.

Later, on cross-examination she testified that "He said UNITE has the majority of the cards and I am prepared to prove it."

Both Raynor and Pepicelli denied that these statements (or any similar statements) attributed to Raynor were spoken. Although CEO Stravitz was present at the hearing herein and available as a rebuttal witness, he was not called as a witness by either party.[6]

It is undisputed that at no time during this meeting did the Union expressly request recognition. Nor did it suggest a date on which a new card check could occur. It did not offer the name of an individual who might conduct a card check. It did not offer to show authorization cards to Brylane, and it did not ask Brylane for a list of employees.

On August 8 a second meeting occurred at the Union's request between Stravitz and Raynor.[7] According to the uncontradicted testimony of Raynor, Stravitz "expressed concern about the nature of the cards that were signed." UNITE proposed that the parties agree upon a card check procedure which would disregard existing cards; entail a new, thirty-day period during which Brylane would provide UNITE with a list of employees within the petitioned unit; the Union would solicit signatures on new authorization cards; and Brylane would refrain from expressing any views or engaging in any conduct antithetical to the Union's campaign. At the conclusion of this period, if a majority of employees had executed cards, the Union could request

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[6] Brylane's CEO appeared under subpoena from UNITE.

[7] This meeting, too, apparently occurred in New York City.

a third party to review the cards; and if a majority of signatures were authenticated, recognition from Brylane would follow. After the Union proposed this new solicitation process at the August 8 meeting, Stravitz reiterated his preference for a Board-conducted election, and the meeting ended inconclusively. Later that day in a telephone call to the Raynor, Stravitz reiterated that he was opposed to the card-check mechanism, but would not "close the door completely" to the concept. That same day the instant petition was filed.

IV. ANALYSIS

Section 9(c)(1)(B) of the National Labor Relations Act provides in pertinent part, that when a petition has been filed:

> by an employer alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section,

the Board shall conduct an investigation, 29 U.S.C. Section 159(c)(1)(B). If the investigation (and/or subsequent hearing) indicates that a question of representation exists, an election is conducted. The Board has consistently construed the language of this section to require evidence of a "present demand for recognition" from a union in order to process a petition under Section 9(c)(1)(B), The New Otani Hotel and Garden, 331 NLRB No. 159, Sl. Op. at 1 (August 24, 2000); Windee's Metal Industries, 309 NLRB 1074 (1992); Albuquerque Insulation Contractor, 256 NLRB 61 (1981). This interpretation is based not only upon the plain language of Section 9(c)(1)(B), but also its legislative history. Congress included the language limiting employer petitions to cases in which a union has presented a "claim to be recognized as the representative defined in section 9(a)" in order to preclude employers from attempting to control the timing of elections. Otherwise employers might file petitions early in organizational campaigns in an effort to obtain a vote rejecting the union before the union has had a reasonable opportunity to organize. Pursuant to the language of Section 9(c)(1)(B), employers can petition for an election only after a union has sought recognition as the majority representative of its employees.

In the case at hand, it is undisputed that at no time has the Union made an express request upon Brylane that it recognize UNITE as the exclusive collective-bargaining representative of any of the Company's Indiana distribution center employees.

The Employer argues, however, that a statement made by UNITE's President at the August 1 meeting which indicated that the Union enjoys majority support among unit members, constitutes a request for recognition. This argument is rejected for several reasons. In an RM proceeding, the burden is upon the Employer to establish that a request for recognition has been made. At the hearing of this case, Brylane presented one witness who in less-than-lucid testimony asserted that Raynor stated that the Union possessed majority support among Brylane employees and was prepared to prove it. Two witnesses presented by the Union, including the person to whom this statement was attributed, denied any such statement was made. The Employer had within its power the ability to rebut this testimony by calling Stravitz as a witness since he also attended this meeting. But it declined to do so. Therefore, the preponderance of

record evidence fails to establish that the statement of majority support attributed to Raynor was spoken. Even if the statement were said, a statement that a union enjoys majority status, without more, does not constitute a demand for recognition. It is undisputed that no date for a card check was proposed by the Union; it did not offer to show the Employer any cards; it did not suggest the name of an individual who might conduct a card check; and the Union did not ask Brylane for a list of employees.[8] The undersigned is aware of no case in which the Board has held that a mere statement of majority status, whether spoken to an employer or to third parties, constitutes a request for recognition.

In its post-hearing brief Brylane cites three cases which it claims stand for this proposition: Amperex Electronic Corporation, 109 NLRB 353 (1954), Westinghouse Electric Corporation, 129 NLRB 846 (1960) and Sonic Knitting Industries, Inc., 228 NLRB 1319 (1977). The Employer's reliance upon these cases is misplaced, for none of them involve a situation where a union made a statement claiming majority employee support. In Amperex the Board dismissed an RM petition for an election within a unit comprised of laboratory technicians. The Union contended that the technicians were already a part of the production and maintenance unit it represented, and argued that the parties' contract barred further processing of the petition. The Board concluded that the laboratory technicians were not members of the existing unit and dismissed the petition not on contract bar grounds, but on grounds that no union had made a demand for recognition among a unit comprised only of technicians. Absent a question concerning representation, no election was warranted. In Westinghouse Electric Corporation, the employer filed an RM petition to give its professional employees an opportunity to vote on whether they wished to continue to be included within a broader non-professional unit of employees. The Board found that since the union persisted in its claim to represent the professional employees in the existing broader unit, a "claim" for recognition existed, and an election was ordered. Lastly, in Sonic Knitting the employer had voluntarily recognized the union as the representatives of its employees at two locations. The employer filed an RM petition seeking an election for the employees of only one of the facilities. The Board dismissed the petition because the union claimed it represented the employees of both facilities, and it "has made no demand for recognition in the petitioned-for unit." Thus, unlike the case at hand, none of these cases involved a statement by a union indicating that it possessed support from a majority of an employer's employees. Brylane's reliance upon some of the dicta in these cases is misplaced. In one part of its decision in Sonic Knitting, for example, the Board summarizes the requisites of Section 9(c)(1)(B) by stating that a QCR is established only by the "claim" of a

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[8] In its post-hearing brief the Employer mischaracterizes the record in this matter regarding certain statements made by Raynor at this meeting. The Employer argues that the Union stated that it had totally discounted an election as a vehicle for the resolution of their dispute. If voluntary recognition is the only solution to the dispute, the argument goes, then a request for a card check coupled with a claim of majority status is tantamount to a demand for recognition. The record testimony does not support the Employer's version of this conversation. Based upon record testimony, at no time – not at the August 1 meeting or otherwise—has the Union said it would not seek an election under any circumstances, Rather, Raynor explained at the meeting that it was the Union's opinion that Brylane's conduct in response to its campaign had so intimidated employees, that a free and fair election could not occur at this time. Thus, based upon record evidence, an election remains a viable option to the Union at some future date.

union "that it represents a majority of the employees." Yet in another portion of the decision, the Board explains that it is dismissing the employer's petition because "the Union has made no demand for recognition in the petitioned-for unit." Thus, the Board refers interchangeably to both a "claim" made by a union and a demand for recognition. However, nowhere does the decision hold that a union's mere statement that it enjoys majority employee support constitutes a "claim" for recognition within the meaning of Section 9(c)(1)(B).

Brylane also argues that statements made by the Union throughout its organizational campaign to third parties to the effect that it enjoys majority status, coupled with a request that Brylane sign a neutrality/card check agreement, constitute a demand for recognition upon Brylane.[9] The Employer cites no case law in support of this proposition, however. And the undersigned is aware of none. Even in Rapera, Inc., 333 NLRB No. 150 (May 2, 2001), Members Truesdale and Hurtgen did not consider statements of majority status made to third parties in the context of a neutrality/card check request, sufficiently reliable evidence upon which to base a finding that a demand for recognition had occurred. Like the case at hand, in Rapera the union made statements in letters to specific individuals, as well as in campaign fliers and newspaper articles, that it enjoyed the support of a majority of the employees in the petitioned unit. Members Truesdale and Hurtgen did not rely upon these statements to third parties as evidence of demand for recognition. Rather, they regarded an affidavit of a union official indicating that the union enjoyed majority support, which had been filed in United States District Court in an unrelated matter, as reliable evidence upon which to find that a demand had occurred. Moreover, Members Truesdale and Hurtgen expressed their concurrence with case precedent which requires that a demand must be made directly upon the employer.[10] Therefore, even under the Truesdale/Hurtgen analysis, no demand for recognition would be found in this case.

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[9] The Employer placed various documents into the record (some of which were authored by the Union and some of which were not), as evidence of the Union's claim for recognition. For purposes of the analysis of this argument, only those documents which were authored by UNITE and/or agents thereof, or which are otherwise attributable to Union have been considered. These include Employer Exhibits 1, 2, 4, 5, 6, 7, 8, 11 and 13 (and its accompanying stipulation of the parties). Other documents are deemed of no evidentiary value since no agency relationship has been established between the author of the documents or assertions contained therein, and UNITE.

[10] In Rapera Truesdale and Hurtgen found this direct connection to the employer through an inference that "It was reasonably foreseeable that the Union's sworn court statement … would become known to the Employer, *Id*, Sl. Op. at 2, n.8.

In Rapera all members of the Board acknowledged that statements of majority status made to third parties during a campaign, coupled with a neutrality/card check request, do not constitute a demand for recognition upon an employer. They also recognized that often statements made by both parties during a campaign, including statements boasting of employee support, may be mere "puffery," *Id,* Sl. Op. at 2. In other contexts, too, the Board has recognized that during an organizational campaign both parties are prone to exaggeration, and the Board no longer recognizes a claim of misrepresentation as objectionable conduct warranting the setting aside of an election, Midland National Life Insurance Company, 263 NLRB 127 (1982), (readopting the principals of Shopping Kart Food Market, Inc., 228 NLRB 1311 (1977)). As the Board stated in Shopping Kart: "…we believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting., *Id* at 1313.

In the present case, public statements of majority support made by UNITE suggest that it, too, may have engaged in a fair amount of puffery. In a handbill distributed to Brylane employees only a month after the advent of its campaign, UNITE boasted that "Over the last few weeks, an [sic] strong majority of Brylane workers have signed union cards!" (emphasis added) While it is possible that the Union obtained signed cards from over 370 employees within a few weeks' time, it is equally possible that the handbill was infected with a bit of puffery. On balance, therefore, one cannot conclude that statements made to third parties indicating that UNITE enjoyed majority support, coupled with a request that Brylane agree to a neutrality agreement and card check procedure, are tantamount to a demand for recognition upon Brylane.

In contrast to these statements of majority status, Brylane asserts that one statement contained in a newspaper article (entitled "Indy Info") authored by a UNITE organizer constitutes a present demand for recognition upon Brylane.[11] The article begins with a report on a demonstration in front of a Sears store in Indianapolis seeking public support for Brylane employees' organizational efforts. This is followed by a description of the "unjust" terms and conditions of employment under which Brylane employees work, and their need for representation. The article proceeds with an assessment of the improvements which can be expected from the collective-bargaining process. It further points out that Brylane is the only distribution center owned by PPR which is not unionized. Lastly, the article discusses forms of support Brylane employees have received from around the country, including the distribution of leaflets to customers of Gucci in Chicago and Sears in Indianapolis, and the visits from workers from Chadwick's of Boston and from France who supported the campaign. Lastly, the article states:

> Brylane has been called upon to answer to their employees' demands and negotiate a contract with them. The workers will not let Brylane stand in their way as they exercise their legal rights to organize the workplace.

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[11] This document is Employer Exhibit 8.

Viewed in the context of the article, it cannot be concluded that this one statement constitutes a demand for recognition directed by UNITE to Brylane. First, the article is written from the perspective of Brylane employees. It is they who are asking that Brylane respect their right to organize. It is their demands for which the employees seek redress, and it is they who urge Brylane to negotiate with them. The phrase "employee demands" is also ambiguous and open to several interpretations. For these reasons it cannot be concluded that this sentence constitutes a "claim" for recognition under Section 9(c)(1)(B).

Lastly, Brylane argues that the content of literature authored by UNITE during its campaign "are at least worthy of treatment no different than that given to informational picketing, because they are designed to communicate the Union's position, beliefs or assertions to third parties." It is true that at times picketing which appears at first blush to be informational or area standards in character may, upon closer examination, be found to have a recognitional object. Here, however, the issue is not whether the Union's campaign had a recognitional object – all campaigns do – but rather, whether the Union has made a present demand for recognition upon Brylane. Thus, the picketing analogy proposed by the Employer is inapplicable.

The facts in The New Otani Hotel & Garden, 331 NLRB No. 159 (August 24, 2000) appear most analogous to the facts in the case at hand. There, the Board affirmed a Regional Director's dismissal of an RM petition on grounds that no request for recognition had been made upon the employer. In New Otani the union had engaged in informational picketing and urged a boycott of the employer's hotel for four years. Like the case at hand, it too had requested that the employer enter into a neutrality/card check agreement. The Board rejected the employer's assertion that picket signs which said that the hotel "does not have a contract" with the union and "has substandard working conditions" constitute a demand for recognition. The Board reiterated the rationale for Section 9(c)(1)(B)'s enactment:

> Thus, the Act contemplates that a union which is not presently majority representative may decide when or whether to test its strength in an election by its decision as to when or whether to request recognition or itself petition for an election, *Id*, Sl. Op at 2.

So, here, too, absent a "present demand" for recognition by UNITE, it is the Union's prerogative to decide when and whether to test its strength in an election or otherwise.

V. ORDER

For the reasons discussed above, IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is DISMISSED.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street N.W., Washington DC 20570. This request must be received by the Board in Washington by September 20, 2002.

ISSUED at Indianapolis, Indiana this 6th day of September, 2002.

Roberto G. Chavarry
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